Wakil-wakil diri kepada Mahadevi a/p Nadchatiram (deceased) v Hong Leong Bank Bhd

A

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2132–09 OF 2013
AZAHAR MOHAMED, MOHTARUDIN BAKI AND HAMID SULTAN JJCA
11 JULY 2014

C

Probate — Administration — Administration action — Property charged to bank — Foreclosure proceedings naming deceased's estate — Executrix informed bank about status two years later — Whether party named in action was fraud — Whether executrix had locus standi — When locus standi accrued

D

The deceased had charged her property to the respondent. When the deceased died, the plaintiff commenced foreclosure proceedings against the property naming only the deceased's estate. Subsequently, a person named as Mahamandelesh Warar Resanand was allowed to intervene and made the second defendant in the action. However, the executrix had informed the plaintiff about her status as executrix; nearly two years before the foreclosure proceedings were commenced. The appellant said that the second defendant whom the plaintiff made a party for the action was a fraud and the court had granted probate to the executrix and trustees of the estate. The plaintiff did not dispute the status of the appellant and impliedly conceded to the second defendant's status as fraud and/or *de son tort* but asserted that the second defendant was added in by way of an order of court and in consequence, the plaintiff's acts were regular. The property which was charged was sold by auction to Talata Ventures Sdn Bhd ('Talata') for RM3.2m by the senior assistant registrar ('the SAR') and the sale was to be completed within 120 days with a payment of 10% deposit. Talata had paid the 10% deposit but was not able to complete the sale within 120 days. The plaintiff with the consent of the second defendant had, by an order of the SAR, given an extension of time to pay by the purchaser. This order of extension the appellant said was bad in law and the SAR had no power or jurisdiction to grant the extension and the appellant said the deposit sum should have been forfeited on account of the deceased's estate and a fresh auction procedure should be convened pursuant to the National Land Code ('the NLC'). The appellant had served encl 30 on Talata who had already paid the balance purchase price to the plaintiff. Talata had chosen not to intervene in the High Court proceeding as well as this appeal. The appellant had also placed a caveat on the property. Notwithstanding the fact the appellant had been granted probate and the fact that the deceased's estate was the first defendant or now the sole defendant in

E

F

G

H

I

A the case, the High Court judge had ruled that the appellant had no locus standi in the proceedings.

Held, allowing the appeal with costs:

B (1) The appellant had the locus standi to make the application. Even if the property has been registered in the name of a bona fide purchaser and the order for sale was found by the court to be a nullity, the court had the power to cancel the registration. The orders of memorandum of sale made by the SAR were orders made without jurisdiction and were C therefore a nullity. Even if there were procedural irregularities in the service of the cause papers or obtaining any of the orders the court should treat them as irregularity and should not nullify the proceedings (see para 10).

D (2) The trial judge erred in law when she concluded that the appellant who had been granted probate had no locus standi. It must not be forgotten that when the deceased died the estate appointing executor and/or executrix of the will, the locus started from the minute of the deceased death. However, in intestate matters a letter of administration must be E obtained and the sealed order must be extracted to be cloaked with locus standi (see paras 11 & 13).

(3) The plaintiff had not strictly complied with the procedural safe guards and there was a non-compliance of the strict statutory provision of the NLC requiring the court to allow the appellant's application to set aside F the order for sale (see para 13).

[Bahasa Malaysia summary

Si mati telah mencaj hartanahnya kepada responden. Apabila si mati meninggal dunia, plaintif memulakan prosiding perampasan harta terhadap G hartanah dengan hanya menamakan estet si mati. Kemudiannya, seorang yang bernama Mahamandelesh Warar Resanand dibenarkan untuk campur tangan dan dijadikan defendan kedua di dalam tindakan tersebut. Walau bagaimanapun, wasi telah memaklumkan plaintif tentang statusnya sebagai wasi; ini juga hampir dua tahun sebelum prosiding perampasan dimulakan. H Perayu menyatakan bahawa defendan kedua yang mana plaintif jadikan pihak untuk tindakan tersebut adalah *fraud* dan mahkamah telah memberikan probet kepada wasi dan pemegangan amanah estet. Plaintif tidak mempertikaikan status perayu dan secara tersirat mengakui kepada status defendan kedua sebagai *fraud* dan/atau *de son tort* tetapi menegaskan bahawa I defendan kedua dimasukkan melalui perintah mahkamah dan akibatnya, tindakan plaintif adalah biasa. Hartanah yang mana dicaj dijual secara lelong kepada Talata Ventures Sdn Bhd ('Talata') untuk sebanyak RM3.2 juta oleh timbalan pendaftar kanan ('TPK') dan jualan hendaklah diselesaikan dalam tempoh 120 hari dengan bayaran deposit sebanyak 10%. Talata telah

membayar deposit sebanyak 10% tetapi tidak dapat menyelesaikan jualan dalam masa 120 hari. Plaintif dengan izin defendan kedua telah, melalui perintah TPK, memberikan lanjutan masa untuk membayar oleh pembeli. Perintah lanjutan ini dikatakan oleh perayu adalah salah dari segi undang-undang dan TPK tidak mempunyai kuasa atau bidang kuasa untuk memberikan perlanjutan tersebut dan perayu menyatakan deposit tersebut patut dirampas atas akaun estet si mati dan prosedur lelongan baru patut diadakan berikutan Kanun Tanah Negara ('KTN'). Perayu telah menyerahkan lampiran 30 ke atas Talata yang telah membayar baki harga belian kepada plaintif. Talata telah memilih untuk campur tangan dalam prosiding Mahkamah Tinggi dan juga rayuan ini. Perayu juga memasukkan kaveat ke atas hartanah. Walaupun fakta perayu telah diberikan probet dan fakta estet si mati adalah milik defendan pertama atau sekarang satu-satunya defendan dalam kes, hakim Mahkamah Tinggi telah memerintahkan bahawa perayu tidak mempunyai locus standi di dalam prosiding.

Diputuskan, membenarkan rayuan dengan kos:

(1) Perayu mempunyai locus standi untuk membuat permohonan. Walaupun hartanah telah didaftarkan dalam nama pembeli bona fide dan perintah jualan didapati oleh mahkamah adalah batal, mahkamah mempunyai kuasa untuk membatalkan pendaftaran. Perintah-perintah memorandum jualan yang dibuat oleh TPK dibuat tanpa bidang kuasa dengan itu adalah batal. Walaupun terdapat luar aturan prosedur dalam penyerahan kertas kausa atau mendapatkan apa-apa perintah, mahkamah patut menganggap ia sebagai luar aturan dan patut membatalkan prosiding tersebut (lihat perenggan 10).

(2) Hakim perbicaraan tersilap daripada segi undang-undang apabila beliau menyimpulkan bahawa perayu yang diberikan probet tidak mempunyai locus standi. Tidak seharusnya dilupakan bahawa apabila si mati meninggal dunia, estet melantik wasi wasiat, locus bermula dari masa kematian si mati. Walau bagaimanapun, dalam perkara-perkara yang tidak berwasiat surat pentadbiran mesti diperolehi dan perintah dimeteraikan perlu diekstrak untuk diselaputi dengan locus standi (lihat perenggan 10 & 13).

(3) Plaintif tidak secara ketat mematuhi kawalan selamat prosedur dan terdapat ketidakpatuhan terhadap peruntukan statutori ketat KTN yang mengkehendaki mahkamah untuk membenarkan permohonan perayu untuk mengetepikan perintah jualan tersebut (lihat perenggan 13).]

Notes

For cases on administration action, see 11 *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2175–2178.

Cases referred to

Al-Rashidy Kassim & Ors v Rosman bin Roslan [2007] 4 MLJ 297; [2007] 3 CLJ 361, FC (refd)
Dato' Ramesh a/l Rajaratnam v Datin Zaleha bt Abd Rahman & Ors [2014] 6 MLJ 651; [2014] 1 LNS 527, CA (refd)
Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon [1991] 2 MLJ 246; [1991] 1 CLJ 732, HC (refd)
Ingall v Moran [1944] 1 KB 160, CA (refd)
M & J Fozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294, SC (refd)
Maimunah bte Megat Montak v Mayban Finance Berhad [1996] 2 MLJ 422; [1996] 3 CLJ 9, FC (refd)
Malayan Banking Bhd v Koay Kang Chuwan & Anor [2010] 5 MLJ 46; [2010] 6 CLJ 172, CA (refd)
Meyappa Chetty v Supramaniam Chetty [1916] AC 603, PC (refd)
Mohamidu Mohideen Hadjiar v Pitchey [1894] AC 437, AC (refd)
Muniandy & Anor v Development & Commercial Bank Bhd & Anor [1996] 1 MLJ 374, FC (refd)
Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals [2008] 6 MLJ 672; [2008] 6 CLJ 626, CA (refd)

Legislation referred to

Federal Constitution art 13(1)
National Land Code ss 257, 267A

Appeal from: Civil Suit No 24NCVC-580-2011 (High Court, Kuala Lumpur)

AK Sharma (AK Sharma) for the appellant.
Chan Mee Leng (Chong Mei Zhi with her) (Seow & Megat) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellant, one of the executrix and trustee of the estate of Mahadevi a/p Nadchatiram's (deceased) appeal against the decision of the learned High Court judge, who had refused to set aside the order for sale in respect of a foreclosure proceeding came up for hearing on 19 February 2014 and we reserved judgment to another date. My learned brothers Azahar bin Mohamed JCA and Mohtarudin bin Baki JCA have read the draft judgment and approved the same. This is our judgment.

BRIEF FACTS

[2] The deceased had charged her property to the respondent. The deceased died on 5 September 2010. The plaintiff on 13 March 2011 commenced

foreclosure proceedings against the property naming only the deceased's estate (see pp 22–26 A/R). Subsequently, a person named as Mahamandelesh Warar Resanand was allowed to intervene and made the second defendant in the action. However, the executrix had informed the plaintiff by a letter dated 19 October 2010 about her status as executrix; that too nearly two years before the foreclosure proceedings were commenced.

[3] The learned counsel for the appellant says the second defendant whom the plaintiff made a party for the action is a fraud and the court has granted probate to the executrix and Trustees of the estate namely: (i) A Raja Rajesvari a/p P Alegendra; (ii) Venkateswari a/p P Alegendra. The plaintiff is not disputing the status of the appellant and impliedly concedes to the second defendant's status as fraud and/or *de son tort* but asserts that the second defendant was added in by way of an order of court and in consequence the plaintiff's acts were regular.

[4] The property which was charged was sold by auction to Talata Ventures Sdn Bhd (Talata) for RM3.2m by the senior assistant registrar (SAR) and the sale was to be completed within 120 days with a payment of 10% deposit. Talata had paid the 10% deposit but was not able to complete the sale within 120 days. The plaintiff with the consent of the second defendant had, by an order of the SAR, given an extension of time to pay by the purchaser. This order of extension the appellant says is bad in law and the SAR has no power or jurisdiction to grant the extension and the appellant says the deposit sum should have been forfeited on account of the deceased's estate and a fresh auction procedure should be convened pursuant to National Land Code (NLC) (see s 267A of the NLC).

[5] It is not in dispute that the appellant had served encl 30 on Talata who has already paid the balance purchase price to the plaintiff. Talata had chosen not to intervene in the High Court proceeding as well as this appeal. The appellant has also placed a caveat on the property.

[6] The more difficult part to comprehend in this case is that notwithstanding the fact the appellant had been granted probate and the fact the deceased's estate is the first defendant or now the sole defendant in the case, the learned High Court judge had ruled that the appellant had no locus standi in the proceedings.

[7] It must be emphasised that the position of the executor or executrix to sue or to be sued is different from the position of the administrator or administratrix. An executor is a person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after the testator's death. However, an

administrator need not be a person appointed by will but is appointed by the court to administer the assets and liabilities of the deceased and thereafter to distribute the same to the next of kin of the deceased. It is trite that unlike an administrator, the executor can sue before probate is extracted. In *Meyappa Chetty v Supramaniam Chetty* [1916] AC 603, Lord Parker observed:

> It is quite clear that an executor derives his title and authority from the will of his testator and not from any grant of probate. The personal property of the testator, including all rights of action, vests in him upon the testator's death, and in consequence is that he can institute an action in the character of executor before he proves the will. He cannot, it is true, obtain a decree before probate, but because the production of probate is the only way in which, by the rules of the court, he is allowed to prove his title.

[8] The question whether an executor can be sued before a grant of probate is extracted was also considered in the case of *Mohamidu Mohideen Hadjiar v Pitchey* [1894] AC 437.

[9] The learned High Court judge as a matter of prudence had proceeded to hear the merits of the application and finally dismissed the said encl 30 which inter alia read as follows:

> (1) Perintah Jual bertarikh 7hb April 2011 diketepikan ex debito justitiae atas alasan Perintah Jual tersebut melanggari prosedur yang ditetapkan oleh undang-undang, kaedah-kaedah dan bidang kuasa yang sedia ada oleh Mahkamah mulia ini.
>
> (2) Lelong awam yang diadakan pada 29hb November 2011 diketepikan dan penjualan hartanah kepada pembeli suci hati (pembida) dibatalkan (annulled) dan deposit 10% sebanyak RM320,000.00 dikembalikan kepada pembeli tersebut.
>
> (3) Jika hartanah didaftarkan atas nama pembeli suci hati, pendaftaran tersebut dibatalkan (cancelled).
>
> (4) Jika pembeli suci hati telah menjelaskan baki harga pembelian sebanyak RM2,880,000.00 baki harga pembelian tersebut dipulangkan kepadanya dan mana-mana pihak yang mempunyai pemilikan ke atas Dokumen Hakmilik Keluaran (Issue Document of Title) mesti menyerahkan secara serta merta kepada Plaintiff.
>
> (5) Jika hartanah tersebut telah didaftarkan atas nama pembeli suci hati, semua memorial yang wujud atas Dokumen Hakmilik Keluaran dan Dokumen Hakmilik Berdaftar dibatalkan oleh Pihak Berkuasa Pendaftar yang berkenaan (Proper Registering Authority).
>
> Dan atau secara alternative:-
>
> (6) Perintah Mahkamah bertarikh 21 hb April 2012 untuk penggantungan transaksi lelongan di bawah Memorandum Jualan bertarikh 29hb November 2011. Perintah Mahkamah bertarikh 15hb Jun 2012 untuk perlanjutan transaksi lelongan di bawah Memorandum Jualan bertarikh 29hb November 2011 selama empat (4) bulan dari tarikh luputnya pada 28hb Mac 2012 hingga 28hb Julai 2012 dan Perintah Mahkamah bertarikh 27hb Julai 2012 untuk perlanjutan transaksi

lelongan di bawah Memorandum Jualan bertarikh 28hb November 2011 selama dua (2) bulan dari 27hb Julai 2012 sehingga 28hb September 2012 diketepikan ex debito justitiae kerana melanggari undang-undang.

(7) Lelongan awam yang diadakan pada 29hb November 2011 diketepikan dan penjualan hartanah kepada pembeli suci hati (pembida) dibatalkan (annulled) the deposit 10% sebanyak RM320,000.00 dirampaskan (forfeited) dan direkodkan kepada akaun Defendan Pertama dalam Plaintiff.

(8) Jika hartanah tersebut didaftarkan atas nama pembeli suci hati pendaftaran tersebut dibatalkan (cancelled).

(9) Jika pembeli suci hati telah menjelaskan baki harga pembelian sebanyak RM2,880.000.00 baki harga pembelian tersebut dipulangkan kepadanya dan mana-mana pihak yang mempunyai pemilikan ke atas Dokumen Halmilik Keluaran (Issue Document of Title) mest menyerahkan secara serta merta kepada plaintiff.

(10) Jika hartanah tersebut telah didaftarkan atas nama pembeli suci hati, semula memorial yang wujud atas Dokumen Hakmilik Keluaran dan Dokumen Hakmilik Berdaftar dibatalkan oleh Pihak Berkuasa Berdaftar yang berkeen (Proper Registering Authority).

Dan untuk kedua-dua prayer utama dan alternative:-

(11) Jika hartanah tersebut belum didaftarkan atas nama pembeli suci hati, pendaftaran hantanah tersebut digantung (stayed) sehingga pelupusan muktamad permohonan ini.

(12) Kos lelongan awam yang diadakan pada 29hb November 2011 semua kos sampingan yang berbangkit ditanggung oleh Plaintiff.

(13) Kos permohonan ini ditanggung dan dibayar serta merta oleh Plaintiff.

(14) Perintah atau relif lain yang Mahkamah ini anggap wajar dan suaimanfaat.

[10] The submission of the learned counsel for the appellant can be summarised as follows:

(a) the appellant has the locus standi to make the application;

(b) even if the property has been registered in the name of a bona fide purchaser and the order for sale is found by the court to be a nullity the court has the power to cancel the registration. And relies on a number of cases and to name a few are as follows: (i) *Muniandy & Anor v Development & Commercial Bank Bhd & Anor* [1996] 1 MLJ 374; (ii) *M & J Fozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294;

(c) the orders of the court granted by the SAR extending the time for sale is ultra vires the provisions of the NLC in particular s 257(1)(g) and s 267A which reads as follows:

s 257(1)(g)

257 Matters to be dealt with by order for sale. (1) Every order for sale made by the Court under section 256 be in Form 16H and shall-[Am Act A1104 - Prior text read — '(1) Every order for sale made by the Court under section 256 shall:-

(g) specify that the balance of the purchase price shall be settled on a date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified.

s 257(1)(h)

(h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) to the chargee shall be forfeited and disposed of in the manner specified under section 267A.

S 267A

Application of deposit upon failure to settle purchase price etc ...

Where the purchaser fails to settle the balance of the purchase price within the period specified in the order for sale under section 257 or 263, the deposit shall be forfeited and shall be applied by the chargee as follows:

(a) firstly, in the payment of all moneys due specified in paragraphs (a) and (b) of sub-section (1) of section 268; and

(b) secondly, in the payment of the balance if any, retained in the account of the chargor for the purpose of reducing the amount due to the chargee in the order of priority specified in paragraphs (c), (d) and (e) of sub-section (1) of section 268.

(d) the decision of the Federal Court in *Maimunah bte Megat Montak v Mayban Finance Berhad* [1996] 2 MLJ 422; [1996] 3 CLJ 9, which had held that s 257 of the Code is mandatory and is binding on the court;

(e) before the amendment to the NLC in 1 December 2001 by Act A1104, the time stated in the memorandum of sale can be extended but even then it can only be done by a judge and not by the SAR, as the SAR has no power to vary the order for sale issued by the judge. (see *Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon* [1991] 2 MLJ 246; [1991] 1 CLJ 732); and

(f) the orders of memorandum of sale made by the SAR are orders made without jurisdiction and are therefore a nullity. The appellant relies on art 13(1) of the Federal Constitution which states:

No person shall be deprived of property save in accordance with law.

[11] The learned counsel for the respondent in the submission does not really dispute the appellant's submission on the issue that time cannot be

extended by SAR and it was in breach of NLC and in consequence the order of sale to Talata ought to be set aside. The learned counsel in essence says:

(a) the order was regularly obtained; and

(b) even if there are procedural irregularities in the service of the cause papers or obtaining any of the orders the court should treat them as irregularity and should not nullify the proceedings. And relies on the case of (i) *Puspavathy a/p Thaveethu v Majlis Perbandaran Klang & Ors and other appeals* [2008] 6 MLJ 672; [2008] 6 CLJ 626; (ii) *Malayan Banking Bhd v Koay Kang Chuwan & Anor* [2010] 5 MLJ 46; [2010] 6 CLJ 172; in support of the proposition. And asserts that the estate is estopped from setting aside the order for sale or the auction.

[12] The learned counsel also concedes the second defendant is a fraudster and/or *de son tort* in the submission which reads as follows:

> It is finally submitted that if the Executrixes are aggrieved by any of the proceedings, their remedies are against the 2nd Defendant who acted as constructive trustee or executor *de son tort* in the proceedings.

[13] We have read the appeal record and the submission of the parties in detail. The court is grateful to the comprehensive submission of the learned counsel. After much consideration to the submission of the learned counsel for the respondent, we take the view that this is a fit and proper case to allow the appeal. Our reasons, inter alia, are as follows:

(a) the learned trial judge erred in law when she concluded that the appellant who had been granted probate had no locus standi. It must not be forgotten that when the deceased dies the estate appointing executor and/or executrix of the will, the locus start from the minute of the deceased death. However, in intestate matters a letter of administration must be obtained and the sealed order must be extracted to be cloaked with locus standi. (see *Ingall v Moran* [1944] 1 KB 160). In exceptional cased the court may cloak the purported administrator with locus. (see *Al-Rashidy Kassim & Ors v Rosman bin Roslan* [2007] 4 MLJ 297; [2007] 3 CLJ 361; *Dato' Ramesh a/l Rajaratnam v Datin Zaleha bt Abd Rahman & Ors* [2014] 6 MLJ 651; [2014] 1 LNS 527); and

(b) we agree with the learned counsel for the appellant that the plaintiff has not strictly complied with the procedural safe guards and there was a non-compliance of the strict statutory provision of the NLC requiring the court to allow the appellant's application to set aside the order for sale.

[14] For reasons stated above the appeal is allowed with costs to the appellant here and below, with the following orders and/or directions:

A (a) the order for sale to Talata — be set aside;

(b) the 10% deposit of RM320,000 received by the plaintiff be dealt with as set out in s 267A of the NLC;

(c) the plaintiff to return the balance purchase price paid to the purchaser; and
B

(d) the plaintiff be at liberty to commence fresh foreclosure proceedings and/or take any other steps according to law.

C **[15]** The plaintiff to pay costs of RM20,000 here and below to the appellant. The deposit to be refunded to the appellant.

We hereby order so.

Appeal allowed with costs.
D

Reported by Afiq Mohamad Noor

E

F

G

H

I